

30. Nor are other earlier relocation models practical. As the Commission noted in the 2 GHz proceeding, "the 'band clearing' method used in the 1970s [was applied to] spectrum ... in the lower frequency bands that was only lightly used and the licensees on those frequencies could be relocated relatively easily."^{56/} At that time, "only two full service UHF television stations and a handful of TV translators had to be moved to new frequencies."^{57/} The situation in the 800 MHz band today is markedly different. Indeed, the Commission acknowledges that "virtually all [SMR] channels in major markets [are] either in use or under construction."^{58/} Unlike prior relocations, the Commission here is not proposing to "clear" broad spectrum bands; rather, the Commission is proposing to permit the implementation on relatively narrow channel bands of advanced technologies as an overlay to already licensed spectrum.

31. As the Commission states repeatedly,^{59/} nearly all 800 MHz SMR spectrum already is licensed; thus, relocation would entail "significant cost and disruption to incumbent licensees

^{56/} Id. at paras. 6, 9.

^{57/} Id. at para. 22.

^{58/} 800 MHz Further NPRM at para. 4.

^{59/} See, e.g., 800 MHz Further NPRM at paras. 4, 13, 23, 31, 32, 34, 35, 37, 46, 48, 49, 57, 71, 99, 104. See also GN Docket No. 94-90, Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, Notice of Proposed Rule Making, FCC 94-202, released August 11, 1994, at paras. 3-14.

and their customers."^{60/} In contrast to the approximately 4,000 point-to-point microwave links in the 120 MHz of spectrum in the 2 GHz band allocated for PCS, the 14 MHz of 800 MHz SMR spectrum is occupied by some 33,000 authorized stations,^{61/} with perhaps hundreds of thousands of subscribers. Massive relocation of 800 MHz licensees would be vastly more expensive and disruptive than relocation of fixed microwave links. Moreover, forced relocation would be unfair to incumbents that have established viable systems under existing Commission rules and policies. In sum, and as the reply comments to the Regulatory Treatment Further NPRM makes clear, the Commission should not mandate relocation of incumbent SMR licensees.

B. Other Rights of Incumbent Licensees

32. Because SMR spectrum is so heavily licensed, the Commission should not grant MTA licensees rights at the expense of depriving incumbents of rights they enjoy under the Commission's rules. The Commission has stated that "any wide-area licensing plan must take into account the interests of existing and future SMR systems that do not seek to provide wide-area service."^{62/} Thus, the rules should permit incumbents to modify and expand their systems under certain circumstances.

^{60/} 800 MHz Further NPRM at para. 34.

^{61/} Id. at para. 4.

^{62/} Regulatory Treatment Third Order at paras. 94, 106.

33. CellCall agrees with the Commission's proposal to allow incumbents to make minor system modifications, such as moving a transmitter because of loss of site.^{63/} In addition, existing wide-area licensees and applicants should be allowed to build out their systems in accordance with their extended implementation authority. Incumbents also should be allowed to expand beyond their existing service areas on MTA-licensed channels with the consent of the MTA licensee.^{64/} If the MTA licensee withholds consent, however, CellCall believes the MTA licensee should be required to construct the requested channel(s) within six months; failure to do so would result in the channel becoming available to the incumbent upon a showing of need that should include the specific geographic area within the MTA for which the channel is sought. This mechanism will provide a measure of flexibility to incumbents with expansion needs, thereby serving the public interest in putting channels to use promptly and efficiently.

V. Use of Auctions to Award MTA Licenses

A. The Commission's Proposal Is Inconsistent with Statutory Requirements

34. In the Regulatory Treatment Third Order, the Commission determined that it would use auctions to resolve mutually exclusive applications for 800 MHz licenses.^{65/} At the

^{63/} 800 MHz Further NPRM at para. 37.

^{64/} See id.

^{65/} Regulatory Treatment Third Order at para. 341.

time this decision was made, however, the Commission made no specific proposal regarding what would be auctioned.^{66/} Now that the details of a wide-area licensing plan have been made, it is appropriate to consider whether auctions are justified in light of that proposal.

35. CellCall does not oppose in principle holding auctions to resolve mutually exclusive applications for 800 MHz SMR channels. The proposal to auction SMR spectrum for MTA licenses, however, contradicts statutory requirements and may lead to results contrary to the goals of the auction legislation.

36. Section 309(j) of the Act specifically obligates the Commission "in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."^{67/} Despite this requirement, the Commission in the 800 MHz Further NPRM has not proposed any alternative to auctions. Notably, the Commission earlier found that first-come, first-served

^{66/} See id.

^{67/} 47 U.S.C. § 309(j)(6)(E). The legislative history of the 1993 Budget Act instructs the Commission "to make its decisions based on sound communications policy.... [I]mportant communications policy objective should not be sacrificed in the interest of maximizing revenues from auctions.... The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so." H.R. No. 103-111, reprinted in U.S.C.A.A.N., 103d Cong. 1st Sess., at 258. See also 47 U.S.C. § (j)(7)(A), (B). The Commission's proposal in the 800 MHz Further NPRM appears to ignore this directive.

application processes, "which work to avoid mutual exclusivity," serve the public interest and should be retained.^{68/} The Commission has not explained why it now is abandoning attempts to avoid mutual exclusivity. Also, in the original 800 MHz NPRM, the Commission proposed allowing mutually exclusive applicants to negotiate to resolve mutual exclusivity.^{69/} Again, this proposal has been abandoned, without explanation. Indeed, it appears that the Commission has artificially created mutually exclusive application opportunities by proposing to award wide-area licenses that encompass already-licensed spectrum.^{70/} In conjunction with limited eligibility, and given the extent to which the 800 MHz channels already are licensed, the Commission should act in the public interest by adopting rules that provide an alternative to mutually exclusive applications and auctions for MTA licenses.

37. Auctions of wide-area 800 MHz SMR licenses in the manner proposed will not satisfy other express statutory goals. Section 309(j) of the Act provides that:

In identifying classes of licenses and permits to be issued by competitive bidding

^{68/} PP Docket No. 93-253, Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Second Report and Order, 9 FCC Rcd. 2348 (1994), at para. 16 & n.7 (citing Section 309(j)(6)(E) of the Act).

^{69/} 800 MHz NPRM at para. 27.

^{70/} The Commission proposes that "[i]f more than one short-form application for an MTA block is received, the applications would be considered mutually exclusive and competitive bidding procedures would be employed to select among the applicants." 800 MHz Further NPRM at para. 59.

[and] in specifying eligibility and other characteristics of such licenses and permits, ... the Commission shall ... seek to promote ... the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public ... without administrative or judicial delays;
(B) promoting economic opportunity and competition by ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants....⁷¹

As the Commission is well aware, SMR licensees, including wide-area licensees, already are implementing publicly beneficial new technologies, products, and services under existing rules.⁷² Indeed, the Commission originally allocated SMR channels to stimulate the implementation of spectrum efficient technology.⁷³ In addition, the spectrum proposed to be auctioned as MTA licenses already has been "disseminated among a wide variety" of licensees and there is no basis for finding that MTA licensees will better serve the public interest than these existing licensees.

B. Application Processing and Procedures

38. Rather than hold auctions for MTA licenses, the Commission should heed Congress' directive to devise licensing

⁷¹ 47 U.S.C. § 309(j)(3).

⁷² See, e.g., 800 MHz NPRM at para. 9.

⁷³ See Land Mobile Services Inquiry, Second Report and Order, 51 FCC 2d 945 (1975), at paras. 28-45.

schemes that work to avoid mutual exclusivity. One such measure, discussed above, is limited eligibility. Thus, initial eligibility to apply for an MTA license should be limited to upper band channel licensees and applicants with pending applications as of August 9, 1994. Following the establishment of a filing date and acceptance of applications, the Commission then should provide mutually exclusive applicants 90 days during which to negotiate to resolve any conflicts and amend or withdraw their applications to eliminate mutual exclusivity. This is consistent with the 1993 Budget Act, which encourages negotiation, and with the Commission's proposal in the original 800 MHz NPRM.^{74/} If mutual exclusivity is not resolved after ninety days, the Commission should proceed to auction. Applications should be placed on Public Notice and granted promptly in the event only a single application is filed or if mutually exclusivity is resolved by the applicants.

39. To the extent that auctions are used to award MTA licenses, CellCall opposes the simultaneous multiple round auction method.^{75/} Given the relatively small number of applications likely to be received if eligibility is restricted, the Commission should instead auction all block licenses within a single MTA at the same time, but auction each MTA individually.

^{74/} 800 MHz NPRM at para. 27. See also Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Second Report and Order, 9 FCC Rcd. 2348 (1994), at n.63.

^{75/} 800 MHz Further NPRM at para. 75.

This method, which is comparable to the processing of cellular unserved area applications, will enable the Commission to expedite processing. The Commission may hold auctions for numerous discrete MTAs on a given day, but will not be required to auction all MTA licenses at once.^{76/}

40. The Commission also seeks comment on what treatment should be accorded Designated Entities ("DEs") under an auction scheme, and whether the Commission should create "Entrepreneurs' Blocks" for licensing exclusively to DEs.^{77/} CellCall agrees with the Commission that Entrepreneurs' Blocks are not feasible given the extent of licensing that already has occurred on SMR spectrum.^{78/}

41. CellCall supports the adoption of special provisions for certain classes of MTA license applicants. As the Commission is aware, the SMR industry has experienced a great deal of consolidation since the Commission first proposed the authorization of wide-area licensing. While incumbents have suffered from the Commission's delays in processing wide-area requests and in adopting wide-area SMR rules, Nextel, which

^{76/} CellCall generally agrees with the Commission's proposals to adopt bidding procedures, procedural, payment, and penalty provisions, and regulatory safeguards similar to those adopted for broadband PCS and set forth in Subpart Q of Part 1 of the rules. 800 MHz Further NPRM at paras. 79-86. However, the Commission should retain flexibility to modify these rules to accommodate the unique nature of the SMR service.

^{77/} Id. at paras. 87-103, 104-106.

^{78/} Id. at para. 104.

received rule waivers to implement a wide-area system three years ago, has not. As a result of these delays, incumbents that wish to compete with established providers such as Nextel have faced significant obstacles in attracting capital and aggregating sufficient quantities of channels to establish competitive systems.^{79/} Consequently, the Commission should adopt special provisions that give incumbent licensees an incentive to seek MTA licenses and that enable them to participate meaningfully in any auction of MTA block licenses. Specifically, eligible applicants (i.e., those with granted or pending applications for upper band channels as of August 9, 1994) who qualify as "small businesses" under the Commission's rules should be granted reduced down payments and installment payment terms.

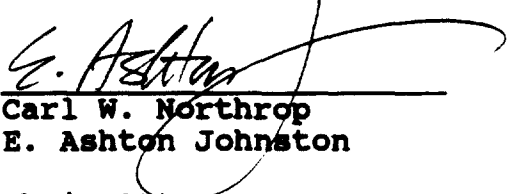
^{79/} CellCall disagrees with the Commission's analysis that "incumbent SMR providers will have the ability to bid more than first-time operators...." 800 MHz Further NPRM at para. 92. This statement ignores the disparity between entities such as Nextel and traditional SMR providers who have expansion needs that may cause them to seek to obtain an MTA license.

WHEREFORE, CellCall respectfully requests that the Commission adopt rules in this proceeding consistent with the foregoing Comments.

Respectfully submitted,

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January 5, 1995

CERTIFICATE OF SERVICE

I, Sondra R. Rich, a secretary with the law firm of Bryan Cave, hereby certify that a copy of the foregoing Comments of CellCall, Inc. were mailed first class, postage prepaid, this 5th day of January, 1995, to the following:

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